IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**05-CV-0329 TCK-SAJ**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Third Party Plaintiffs,	)	
	)	
vs.	)	
	)	
CITY OF TAHLEQUAH, *et al.*,	)	
	)	
Third Party Defendants.	)	

DEFENDANTS, GEORGE'S, INC. AND GEORGE'S FARMS, INC.'s RESPONSE TO PLAINTIFFS' AUGUST 24, 2006 MOTION TO COMPEL RESPONSES TO PLAINTIFFS' MAY 30, 2006 REQUESTS FOR PRODUCTION

Come now Defendants in the above-styled cause, George's, Inc. and George's Farms, Inc. ("George's"), and hereby submit their Response to the Plaintiffs' Motion to Compel George's to Respond to the May 30, 2006 Set of Requests for Production and Brief in Support (Dkt. #896) ("Motion to Compel"), and states as follows, to-wit::

I. INTRODUCTION

On May 30, 2006 the Plaintiffs propounded discovery requests to several of the Defendants who were also defendants in the unrelated *City of Tulsa v. Tyson Foods, Inc.* case, (No. 01-CV-0900EA(C), hereinafter the "Tulsa Lawsuit") requesting among other things, that George's produce "copies of all documents and materials made available for inspection and copying by you [George's] to the plaintiffs in the [Tulsa Lawsuit]." *See*

George's Responses to Plaintiffs' May 30, 2006 Set of Requests for Production, Request No. 1, attached to Plaintiffs' Motion to Compel as Exhibit "A". George's objected to these requests on multiple grounds, and in particular on the basis that the Tulsa Lawsuit involved entirely distinct poultry operations in a separate watershed, involved terrain, hydrology, reservoirs, point sources, third-party operations, experts, alleged injuries and issues that were entirely different from those at issue in the Plaintiffs' lawsuit over the Illinois River Watershed, which rendered the requests impermissibly overly broad and burdensome.

It should be noted from the outset that George's maintains and reasserts its prior objections to the Plaintiffs' requests for production to the extent that this Response does not directly address them. This includes George's objections to the extent that the requests seek George's confidential business information and trade secrets.

When George's participated in a meet and confer session with Plaintiffs' counsel, Plaintiffs' counsel admitted that they had prepared a list of "issues" related to the Tulsa lawsuit, which they claimed were guiding their discovery efforts and requests. When George's counsel asked to be provided with the list so that the scope of the dispute might be narrowed, Plaintiffs' counsel refused. George's counsel then advised that if the Plaintiffs would make some reasonable effort to define those topics and documents it believed were relevant to the instant lawsuit and tailor the requests accordingly, George's would be willing to further respond in an attempt to accommodate a more reasonable scope of discovery. However, Plaintiffs' counsel again flatly refused to do so, and demanded that George's immediately screen all of the Tulsa Lawsuit documents, determine what is relevant, and produce them. George's counsel expressed the view that

such tactics were improper under the Federal Rules of Civil Procedure, and this Motion to Compel followed.

The Plaintiffs' wholesale request for documents produced in the Tulsa Lawsuit was also followed by five additional blanket requests for *all* privilege logs, *all* written discovery responses, *all* employee deposition transcripts, *all* expert deposition transcripts and *all* "documents and materials referring, relating or pertaining to the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit." *See* Plaintiffs' Motion to Compel, Exhibit "A" at Request Nos. 2-6. Finally, Plaintiffs request that George's produce all joint defense agreements pertaining to the instant lawsuit. *See* Motion to Compel, Exhibit "A" at Request No. 7.

The Plaintiffs' requests for production of *all* documents from another litigation without any apparent attempt to craft requests to reach documents with evidentiary value in the current lawsuit amounts to a fishing expedition which is both inappropriate and prohibited under Rule 26 of the Federal Rules of Civil Procedure. Nevertheless, the Plaintiffs seek to justify its deficiently drafted discovery by contending that its objective was "to save *all the parties* involved time and money." *See* Plaintiffs' Motion to Compel at 2 (emphasis added). This claim is untenable, as the mass of documents swept up in these requests exist, for the most part, in only hard copy form, and fill approximately numerous, voluminous boxes. Notwithstanding the similarities the Plaintiffs claim between this lawsuit and the Tulsa lawsuit, their May 30, 2006 requests for production far exceed the scope of relevancy of any claim or defense at issue in this lawsuit. Furthermore, the Plaintiffs have not, as otherwise required by Rule 26, demonstrated that

its overly broad and burdensome requests are supported by the good cause contemplated under Rule 26 to gain access to the otherwise irrelevant, undiscoverable documents requested through its May 30, 2006 discovery.

Granted, there may be certain, superficial similarities between this lawsuit and the Tulsa lawsuit. In their Motion to Compel, the Plaintiffs set forth a laundry list of purported similarities between the two cases, but fail to actually support any of these conclusory claims that the documents from the Tulsa Lawsuit will actually be probative of any issue in the instant case. Using the Plaintiffs' loose logic, a party could freely probe into all of another party's prior litigation without making any showing of actual relevance to the matter at hand by simply baldly alleging that the nature of the lawsuits were similar. Rule 26 requires more than this.

In fact, George's expressed to the Plaintiffs' counsel that it would be willing to work with them to narrow the requests to Tulsa documents that may have some arguable relevance to the issues in this case. Unfortunately, the Plaintiffs' refusal to expend any effort or to reach any compromise has left the parties at an impasse. Had the Plaintiffs taken the appropriate level of care and given a sufficient level of consideration to the specific topics and documents it could reasonably claim to be relevant to the instant action rather than simply propound these broadly sweeping requests, the Court's involvement in this discovery dispute would likely have been unnecessary. By way of example, on July 10, 2006 the Plaintiffs propounded 125 specific and directed requests for production on George's, seeking information and materials arguably related to its claims in this lawsuit. Although George's does have objections to the July 10th set of discovery requests, the Plaintiffs have at least demonstrated their ability to craft detailed

discovery on the issues in the instant lawsuit directed to obtain the types of information it seeks to support its claims.

Nevertheless, the Plaintiffs have requested *all* documents from the prior Tulsa Lawsuit. Under Rule 26, Plaintiffs must demonstrate that the materials requested from the Tulsa Lawsuit, as well as any current joint defense agreement, have some evidentiary value in this lawsuit. The blanket requests that are the subject of their Motion to Compel do not pass muster under this standard. Plaintiffs cannot reasonably contend that every document, every grower file, every expert's file, every privilege log or every deposition transcript referring, relating or pertaining to the Tulsa Lawsuit and the joint defense agreements in this action are relevant or will lead to the discovery of admissible evidence in this action. Accordingly, Plaintiffs' Motion to Compel should be denied with regard to the overly broad, burdensome and irrelevant Requests for Production Nos. 1 through 7, and they should be directed by the Court to revise their requests to include a more appropriate scope, which would enable George's to properly respond.

II. ARGUMENT AND AUTHORITY

A. The Plaintiffs are Not Entitled to Conduct a Fishing Expedition into Prior Litigation Involving the *City of Tulsa* Case

By failing to articulate any definable scope of discovery other than simple blanket requests, the Plaintiffs' requests constitute no more than a mere fishing expedition and an improper attempt to harass George's. Courts have recognized that '[t]he legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow *fishing expeditions* in discovery.'" *Martinez v. Cornell*

Corrections of Texas, 229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, at *2 (N.D.Ill.1998) (emphasis added).

It has been long established that discovery cannot be used "merely to vex or harass litigants." *Keenan v. Texas Production Co.*, 84 F.2d 826, 828 (10th Cir. 1936). "Neither can it be utilized for a mere fishing expedition, nor for impertinent intrusion." *Id.* Furthermore, 'the district court . . . is not "required to permit plaintiff to engage in a 'fishing expedition' in the hope of supporting his claim."' *Martinez* at 218 (quoting *McGee v. Hayes*, 43 Fed.Appx. 214, 217 (10th Cir. 2002)). George's reminds the Court that it does not dispute that there may be some relevant and discoverable documents contained within the thousands of pages swept up in the Plaintiffs' requests, yet the impermissible burden of these requests stems from their complete lack of limitation, thereby encompassing a significant volume of documents and information that are in no way relevant to any claim or defense in this lawsuit. Rather, the Plaintiffs' requested discovery constitutes an impermissible endeavor to compel an opposing party to produce a mass of documents from previous litigation involving different operations in a different watershed based on the mere whim that there may be a few documents of interest discovered.

1. The Plaintiffs' Requests for Production Are Overly Broad, Burdensome, and Include a Mass of Irrelevant Documents

The Plaintiffs' unlimited requests for production are overly broad and burdensome. In the case of *Audiotext Communications v. U.S. Telecom, Inc.*, the court denied the plaintiff's motion to compel discovery to the extent that they exceeded relevant issues in the litigation. The court stated:

> Requests should be reasonably specific, allowing the respondent to readily identify what is wanted. Requests which are worded too broadly or are too all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not. They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request. The court does not find that reasonable discovery contemplates that kind of wasteful effort. In this instance the court finds that most of these requests fail the test."

Audiotext Communications v. U.S. Telecom, Inc., 1995 WL 18759 * 1 (D. Kan. 1995). The total discovery materials from the Tulsa Lawsuit sought by the Plaintiffs' requests is comprised of thousands of documents available only in paper form. A mere sampling of the completely irrelevant topics covered by the Plaintiffs' requests include:

- Nutrient Management Plans for Eucha/Spavinaw ("E/S") poultry growers;
- Contract and addenda for E/S poultry growers;
- Flock settlement print outs for E/S poultry growers;
- Vaccination and mortality records for E/S poultry growers;
- Flock inspection reports for E/S poultry growers;
- Grower files for E/S poultry growers;
- Depositions of E/S poultry growers;
- Reports, depositions and files of at least five experts covering irrelevant topics such as: the operations of Tulsa's Wastewater treatment lagoons at lake Eucha; Tulsa's management of Lake Eucha and Spavinaw; Tulsa's potable water treatment technologies; water quality of streams, groundwater and reservoirs in E/S Watershed; impacts of third-parties identified in the E/S Watershed; criticisms of the Plaintiffs' experts' principles and methodologies; modeling of hydrology and reservoirs in the E/S Watershed; analysis of Tulsa's claimed taste and odor complaints; maintenance of Tulsa's water distribution system; and
- Documents pulled from Tulsa's files relating to the watershed, the lagoons, taste and odor, and water treatment.

As a request for production, the Plaintiffs' seeking of privilege logs from the Tulsa Lawsuit is particularly interesting. If George's is required to produce any of the Tulsa Lawsuit documents in this case, and that production includes any privileged or confidential documents, those documents will have to be logged in this case. The claims of privilege in a prior case are inextricably intertwined with the production of those underlying documents. If the scope of the production is narrowed by virtue of the Court's Order on the instant Motion, it would be improper to require George's to disclose, by virtue of producing its prior logs, the existence of other non-responsive documents, and thus as a stand alone request, the Plaintiffs' pursuit of the Tulsa privilege logs should be denied.

Moreover, the work product of the experts retained in the Tulsa Lawsuit has no relevance to the Illinois River Watershed, and since George's has not designated any of the same experts to testify for it in this case, these reports and materials cannot be used as impeachment material. Should George's designate any of the experts used in the Tulsa Lawsuit, Plaintiffs can re-issue requests related to their prior work.

It is apparent that if the Plaintiffs' motion to compel is granted, George's would be subjected to the same abusive and wasteful form of discovery that the *Audiotext* court denied. Thus, the Plaintiffs cannot reasonably contend that its overly broad and burdensome requests for production are "simply an effort to save *all the parties* involved time and money." *See* Motion to Compel at 2 (emphasis added). The overwhelming amount of irrelevant, or at best, marginally relevant documents and materials swept up in the Plaintiffs' requests render them clearly overly broad and unduly burdensome, and a waste of time and money.

A request for production of documents must be described with reasonable particularity. *Fed. R. Civ. P.* 34(b). A designation by category or subject matter is reasonable under most circumstances, but designations that are chiefly "any and all documents" are generally wanting. *Richland Wholesale Liquors, Inc. v Joseph E. Seagram & Sons, Inc.*, 40 FRD 480, 481 (DC SC 1966). Courts have repeatedly held that blanket, or catchall, requests for documents do not comply with Rule 34. For instance, a request for "all other correspondence, memoranda, and documents" was held overly broad. *De Long Corp. v Lucas*, 138 F Supp 805 (DC NY 1956). In *Georgia Power Co. v. EEOC*, the court found the catchall paragraph seeking any additional documents in the custody or control of defendant company to be too broad and vague. 295 F. Supp. 950 (ND Ga. 1968). In *Flickinger v. Aetna Casualty & Surety Co.*, the court found that the blanket requests for documents encompassed fishing expeditions of the most blatant character and were objectionable as being unnecessarily oppressive and burdensome. 37 F.R.D. 533, 535 (WD Pa. 1965).

The Plaintiffs in the instant case advance the erroneous claim that George's assertion of burdensomeness is too conclusory, and further suggests that George's failed to allege specific facts to support proposition of burdensomeness. The irony of the Plaintiffs' argument is its own requests for production fail to supply any specificity as to which documents it seeks from the Tulsa Lawsuit pertain to the issues at hand. Among others, the Plaintiffs cite *Tucker v. Outsu Tire & Rubber Co.* for the proposition that non-specific objections are insufficient to prevent the requested discovery. *Tucker v. Outsu Tire & Rubber Co.*, 191 F.R.D. 495 (D. Md. 2000). The Plaintiffs' argument fails as George's objected to the Plaintiffs' discovery requests in detail as set forth in George's

responses to the Plaintiffs' May 30, 2006 requests for production, and as it continues to object in this Response. *See* Motion to Compel, Exhibit "A" at Request Nos. 1-6.

Additionally, the Plaintiffs also refuse to recognize George's objections regarding the relevant statutory periods intended to define a reasonable scope of discovery. The Plaintiffs' requested discovery and the scope of reasonable burden should be limited to the longest period of limitations under the claims asserted, *i.e.,* its CERCLA claims. CERCLA § 112(d), 42 U.S.C. § 9612(d). Despite the Plaintiffs' contention that it is unencumbered by any statute of limitations, several federal courts have specifically recognized the applicability of the CERCLA statute of limitations as Plaintiffs' claims. *See Plaintiffs of Colo. v. ASARCO, Inc.*, 616 F.Supp. 822 (D. Colo. 1985); *Plaintiffs of Idaho v. Bunker Hill Co.*, 634 F.Supp. 800 (D.Idaho 1986); *Plaintiffs of N.Y. v. General Elec. Co.*, 592 F.Supp. 291 (N.D.N.Y. 1984). Therefore, George's has fulfilled its obligations to show specific facts that establish the overly broad and burdensome nature of the Plaintiffs' requested discovery.

2. Based Upon the Facial Over Breadth of The Plaintiffs' Requests Pertaining to the Tulsa Lawsuit, it Has Failed to Meet its Burden to Show Relevance

As set forth in the prior section, the Plaintiffs' requests for production encompass a large number of irrelevant documents and materials that are not discoverable in this case. Rule 26 of the Federal Rules of Civil Procedure controls the scope of discovery and provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." *Fed. R. Civ. P.* 26(b)(1). Courts have held that "a request for discovery should be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party." *Owens v.*

Sprint/United Mgmt. Co., 221 F.R.D. 649, 652 (D. Kan. 2004). "'[T]he object of inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue'". *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, at *2 (N.D. Ill. 1998).

Here, the Plaintiffs grossly oversimplify the relevancy issue by asserting that *all* documents and materials requested from the Tulsa Lawsuit are somehow relevant to this lawsuit despite its admission that "the instant case and the *City of Tulsa* case are not completely identical." *See* Motion to Compel at 5. Faced with George's showing of the nature of the documents contained within the scope of the Plaintiffs' requests, it would constitute a departure from logic if George's were compelled to produce documents and materials encompassing *all* issues of the Tulsa Lawsuit, when—by the Plaintiffs' concession—only *a fraction* of the information sought potentially applies to the issues in this lawsuit. It is the Plaintiffs' burden to propound discovery that reasonably defines the scope of documents sought. It is not George's obligation to sift the mass of documents from the Tulsa Lawsuit to make decisions about what might possibly be relevant within these broad requests.

The Plaintiffs fail to acknowledge the most significant distinctions between the Tulsa Lawsuit and this action. Both cases involve environmental claims of impact from the land application of poultry litter to water resources. Yet, the setting for the lawsuits are distinct – two separate watersheds. By its very definition, the activities in one watershed cannot, and do not, affect the water in another watershed. Further, the alleged impacts in the Illinois River Watershed could only derive from conduct on lands within

its boundaries. Thus, how can the ownership, operations, and finances of poultry growers in the E/S Watershed have any probative value on this point in the Plaintiffs' case? They cannot. How can the Plaintiffs argue that it needs information regarding how Tulsa managed its reservoirs, water treatment plants, lagoons and distribution system, including the experts' evaluations of these issues to advance its case against the Defendants? It cannot. How can the defense experts' evaluations of the principles and methodologies employed by Tulsa's experts be used in the instant case? They cannot. The distinctions between the two cases make it clear that the scope of Plaintiffs' requests for production include documents and materials having neither evidentiary value nor any bearing on any claim or defense in this lawsuit. Thus, the Plaintiffs' motion to compel should be summarily denied because the requests are so broadly drafted that irrelevant documents and materials will make up the vast bulk of the documents sought.

The Plaintiffs have failed to meet their burden to establish relevance. "[W]hen the request is overly broad on its face or when relevancy is not readily apparent, the party seeking the discovery has the burden to show the relevancy of the request." *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D. Kan. 2004). Here, the Plaintiffs' requests are both overly broad on their face and it is not readily apparent how *all* or even a substantial portion of the documents requested are relevant to the issues in this lawsuit.

The Plaintiffs place undue reliance on a single products liability case to claim that all discovery in the Tulsa lawsuit is somehow relevant to its own. *Snowden v. Connaught Labs.*, Inc., 137 F.R.D. 325 (D. Kan. 1991). However, the issues in this lawsuit are significantly different from those in the *Snowden* case. First, unlike *Snowden*, this case is not a products liability case where the requested discovery of the prior litigation involves

a uniform subject matter and a single identical product. On the contrary, the subject matter of this lawsuit involves allegations of contamination attributed to a multitude of factors that are unique to a given geographic region and hydrology.

Second, the *Snowden* case does not control because it applies a prior version of Federal Rule of Civil Procedure 26. *Snowden v. Connaught Labs.*, Inc., 137 F.R.D. 325 (D. Kan. 1991). Since the *Snowden* decision, the scope of relevant discovery under Rule 26 has been limited to that which is "relevant to a claim or defense." Fed. R. Civ. P. 26(b)(1). The Plaintiffs inappropriately seek to use an outdated and broader version of Rule 26 applied in *Snowden* which the court held allows discovery "if there is any possibility that the information sought may be relevant to the subject matter of the action." *Snowden*, at 329.

Since the amendments to Rule 26, courts have recognized the narrowing of relevant discovery scope "from 'subject matter' of the action to 'claim or defense or defense of any party.'" *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 31235717 * 2 (S.D.N.Y. 2002) (citing Fed. R. Civ. P. 26(b)(1) advisory committee's note to the 2000 amendment); *see also Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (stating that the 2000 amendment was made with the intent "that the parties and the court focus on the actual claims and defenses involved in the action"). The *Johnson Matthey* court ultimately denied a motion to compel similar to the Plaintiffs' seeking discovery of documents related to prior litigation because the request concerned matters which are "in no way relevant to a claim or defense at issue." *Id.* As in that case, the Plaintiffs' requests for production here encompass documents and materials from prior litigation that are irrelevant to claims or defenses in *this lawsuit*. Thus, the

Plaintiffs' requests for production exceed the scope of relevant discovery permitted under the current version of Rule 26.

George's has nonetheless met its burden required to establish that the Plaintiffs' requests are overly broad due to the lack of relevance:

> When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed.R.Civ.P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.

Owens v. Sprint/United Mgmt. Co., at 652. As explained above, George's has shown that the requested discovery exceeds the scope of relevance, and any marginally relevant information contained in the expanse of the Tulsa Lawsuit documents is substantially outweighed by substantial burden and potential harm borne by George's if it were required to produce—without the requisite showing of relevance—all of the materials requested. It might be added, too, that all of the productions in the Tulsa Lawsuit were made pursuant to a validly entered protective order and confidentiality order by the Court in that case, and that testimony and productions in that case also included designated portions which were deemed to be for "Attorneys' Eyes Only," due to the confidential and proprietary nature of the materials in the competitive business in which the defendant companies were, and are, engaged. The Plaintiffs' blanket requests would ignore these protections. George's has fulfilled each of the independent requirements for establishing a lack of relevance of the materials sought through the Plaintiffs' overly broad and burdensome discovery requests.

B. The Joint Defense Agreements are not Discoverable

As noted above, the Plaintiffs seek to invade to province of George's privilege by requesting that George's produce copies of any joint defense agreement executed in conjunction with this lawsuit. The Plaintiffs make the incredible assertion that it requires access to these joint defense agreements in order that it might "evaluate George's privilege claims in this litigation." *See* Motion to Compel at 10. Notably, this is the Plaintiffs' only justification for requesting documents which are privileged and otherwise irrelevant to any claim asserted by the Plaintiffs in this action. Consequently, the Plaintiffs have failed to show that any joint defense agreement falls within the purview of a discoverable document under the current version of Rule 26.

As an initial matter, the existence of any privilege is a matter of law exclusively within the Court's domain to evaluate and determine. *See*, *e.g.*, *Dick v. Truck Ins. Exch.*, 386 F.2d 145, 147 n.2 (10th Cir. 1967); *SCO Group, Inc. v. Novell, Inc.*, 377 F. Supp. 2d 1145, 1152 (D. Utah 2005). Furthermore, a written agreement is not necessary for a party or parties to maintain a joint defense arrangement or to assert a claim of joint defense privilege. *United Plaintiffs v. Stepney*, 246 F. Supp. 2d 1069, 1080 n.5 (N.D. Cal. 2003). The existence of a written agreement merely assists *the trial court* in assessing whether a particular communication was made pursuant to a joint defense effort. *Id*.

That said, however, the joint defense agreements to which George's is a party in this lawsuit are protected by the common interest privilege in conjunction with either the attorney/client privilege or the attorney work product doctrine. *McNally Tunneling Corp. v. City of Evanston*, 2001 WL 1246630 (N.D. Ill. 2001). The common interest doctrine

extends protections afforded by other doctrines, such as attorney client privilege and attorney work product, to protect privileged communications disclosed to third parties sharing a common interest in the litigation that would otherwise constitute waiver. *Id.* at *2. The rationale for common interest protection is that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *United Plaintiffs v. Duke Energy Corp.*, 214 F.R.D. 383, 387 (M.D. N.C. 2003).

Here, George's shares a common interest in the outcome of the litigation with its Co-Defendants named in this lawsuit and, accordingly, this is reflected in the joint defense agreements. The joint defense agreements contain both attorney/client communications and work product. Thus, George's joint defense agreements are protected despite having been disclosed to the Co-Defendants, because the common interest doctrine extends the attorney/client communications or work product protections to the other Co-Defendants.

George's joint defense agreements are protected from discovery by the common interest doctrine in conjunction with the attorney/client privilege. *McNally*, 2001 WL 1246630 at * 4. The *McNally* court found that a joint defense agreement can be protected by attorney/client privilege where "(1) legal advice of any kind is sought, (2) from a professional legal advisor in her capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor (8) except the protection be waived." *McNally*, 2001 WL 1246630 at * 4 (applying Illinois law). Here, George's joint defense agreements meet these elements, and notwithstanding the fact that the

Plaintiffs fail to cite authority to the contrary, they are therefore protected by the combination of the common interest doctrine and attorney/client privilege.

In addition, George's joint defense agreements are protected from discovery by the common interest doctrine in conjunction with the work product doctrine. The *McNally* court held that, if disclosed, the joint defense agreement in that case was protected as work product to the extent that it would reveal mental impressions and thought processes of attorneys for the defendants sharing a common interest. *McNally*, 2001 WL 1246630 at * 4. The joint defense agreement in the *McNally* case described the co-defendant's joint defense strategy. *Id.* at * 3. That court further reasoned that the joint defense agreement was protected because it had been clearly prepared in anticipation of litigation and the document would reveal the mental processes of the City of Evanston's attorney regarding the possible defense to the litigation. *Id.*, at * 4. Here, George's joint defense agreements were clearly prepared in anticipation of litigation and contain information that, if disclosed, would reveal attorneys' mental impressions and thought processes, such as litigation strategy. Therefore, George's joint defense agreements in this lawsuit are protected by the common interest doctrine in combination with the attorney work product doctrine.

The Plaintiffs conveniently cite a case that applies the common interest and work product doctrines applied in *McNally*. *Power Mosfet Techs. v. Siemens* AG, 206 F.R.D. 422 (E.D. Tex 2000). However, even though the *Power Mosfet* court correctly applies the same principles in its holding, that case is factually distinct from this case. *Id.* The court in *Power Mosfet* found the joint defense agreement was not protected as work product because they did not reveal counsel's mental impressions or thought processes.

Id. Here, George's joint defense agreements contain information that, if disclosed, would reveal attorney's mental impressions and thought processes. Therefore, the court should not be misled by the Plaintiffs' use of the *Power Mosfet* holding, and should instead find that George's joint defense agreements are protected under the common interest and attorney work product doctrines.

At the very least, courts generally order an *in camera* inspection in assessing joint defense agreements to make a specific determination as to whether the agreement should be produced in litigation by way of responding to a discovery request seeking the agreement. *Power Mosfet Tech. v. Siemens Ag*, 206 F.R.D. 422 (ED Tex. 2000); *see Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621 (ED Tex. 1993). In *Beneficial Franchise Co. v. Bank One, N.A.*, the parties needlessly debated the significance of the defendants' failure to produce the written joint defense agreement they said existed. Rather than indulge in speculation, the court conducted an *in camera* review of the joint defense agreement. 205 F.R.D. 212, 220 (N.D. Ill. 2001).

The Plaintiffs have failed to establish the requisite proof required by Rule 26(b)(3) of the Federal Rules of Civil Procedure to discover documents otherwise protected by the work product doctrine. The work product doctrine provides a qualified privilege that may be overcome if the party seeking discovery establishes either a 'substantial need' or 'undue hardship' argument that justifies disclosing the protected document or thing. *Id.*, at * 4 (discussing Fed. R. Civ. P. 26(b)(3)). As previously explained, the Plaintiffs have failed to show a substantial need or undue hardship to justify the need for obtaining George's joint defense agreements despite work product protection. The Plaintiffs only allege "[s]uch agreements are relevant inasmuch, to the

extent there are any, they are necessary for the Plaintiffs to evaluate George's privilege claims in this litigation." Motion to Compel at 10. This proposition is outrageous and falls well short of establishing 'substantial need' or 'undue hardship' necessary to satisfy Rule 26(b)(3) to obtain the joint defense agreement over work product protection. As noted above, this Court has within its exclusive domain the ability to evaluate and determine whether a privilege exists. Therefore, the Plaintiffs have failed to overcome the protection afforded to George's joint defense agreements by the common interest privilege in conjunction with either the attorney/client privilege or the attorney work product doctrine.

C. The Plaintiffs are not Entitled to Discover the Confidential Documents Reflecting the Implementation of the Settlement of the Tulsa Lawsuit

In their Request No. 6, the Plaintiffs seek the production of documents relating to "the implementation of and compliance with the terms of the consent order entered in the [Tulsa lawsuit]." Once again, the Plaintiffs seek documents that are neither relevant to the issues in its lawsuit against the Defendants, nor will this information lead to the discovery of admissible evidence. The Settlement Order establishes certain activities that must take place during the four years post-settlement, and dictates those items the participating defendants are required to fund. Case No. 01-CV-0900 EA(C), Docket No. 473. The Order also sets forth what elements of the post-settlement activities are to be made public in reports to the Court through the Special Master and Watershed Management Team. *Id.* at Ex. 1, Para. D(6), E(5), E(7). Accordingly, George's objected

to this request and directed the Plaintiffs to the Court's Special Master, John Everett, J.D., P.E. to obtain those materials.

Despite the arguments advanced in its Motion for production of the "operational" documents from the Tulsa Lawsuit, the Plaintiffs offered no justification for invading George's confidential records to probe into the costs of the Tulsa Lawsuit settlement implementation beyond what Judge Eagan deemed necessary to disclose. The confidential elements of the Tulsa Lawsuit settlement and how they are being accomplished have no bearing on any claim of liability or defense in the instant lawsuit. The very notion that the Plaintiffs can invade these financial details, which George's deems to be confidential, undermines the incentive any party would have for settling such a claim. Even the settling party, the City of Tulsa, has no right to discover this information, as all that is relevant in that case is whether the Order is being complied with and the specific reports are made which the Court has required of the Special Master. The Plaintiffs have made no showing with regard to this material, and therefore, George's requests that the Plaintiffs' Motion with regard to Request No. 6 be denied.

CONCLUSION

For all of the above reasons, Defendants, George's, Inc. and George's Farms, Inc. respectfully request the Court to deny the Plaintiffs' August 24, 2006 motion to compel and order the Plaintiffs to amend their May 30, 2006 requests for production to ask for specific documents and materials from the Tulsa Lawsuit that are relevant only to a claim or defense in this lawsuit.

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CERTIFICATE OF SERVICE

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